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EMPLOYMENT LAW LETTER

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LEGISLATION

Lifting the fog around workplace vaping

by Lisa Berg
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Personal vaporizers are battery-powered devices used to simulate the experience of smoking. The odorless devices come in a variety of shapes and sizes. E-cigarettes look like traditional cigarettes, vaping pens appear similar to large ballpoint pens, and still others look like industrial-sized hookahs. The devices work by heating a solution known as an e-liquid (or "juice") and atomizing it into an aerosol vapor that is inhaled by the user. This activity is referred to as "vaporing," or "vaping" for short. In recent years, the trend around the country has been to regulate vaping in the workplace.

Smokin' hot new law

In Florida, smoking has been banned from most indoor workplaces since 2003, when the Florida Clean Indoor Air Act (FCIAA) was amended to include a ban on tobacco smoking. The FCIAA was originally passed to protect people from secondhand smoke, and it has been modified several times since it was enacted in 1985.

In November 2018, nearly 70 percent of Florida voters approved a constitutional amendment to ban vaping in most indoor workplaces. In July, a new law implementing that constitutional amendment and further modifying the FCIAA took effect.

To vape or not to vape?

The amendment to the FCIAA broadly defines "vape" or "vaping" to include inhaling or exhaling vapor produced by a vapor-generating device or possessing a vapor-generating electronic device while it is actively employing an electronic, chemical, or mechanical means designed to produce vapor or aerosol from a nicotine product or any other substance.

The FCIAA now prohibits vaping as well as smoking in enclosed indoor workplaces unless it occurs in one of the following places:

- A private residence when it is not being used commercially to provide child care, adult care, or health care;
- A retail tobacco shop;
- A retail vape shop;
- A designated guest room at a public lodging establishment;
- A stand-alone bar that does not serve food; or
- An enclosed indoor workplace, to the extent that tobacco smoking or vaping is an integral part of a smoking or vaping cessation program, or medical or scientific research is conducted there.

AGENCY ACTION

New wage and hour opinion letters issued. The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) in July announced new opinion letters related to the Fair Labor Standards Act (FLSA). **FLSA2019-7** addresses the calculation of overtime pay for nondiscretionary bonuses paid on a quarterly and annual basis. **FLSA2019-8** addresses the application of the highly compensated employee exemption to paralegals employed by a trade organization. **FLSA2019-**9 addresses permissible rounding practices for calculating an employee's hours worked. **FLSA2019-10** addresses the compensability of time spent in a truck's sleeper berth while otherwise relieved from duty. The DOL allows users to search existing opinion letters by keyword, year, topic, and a variety of other filters. The search function can be accessed at www.dol.gov/whd/opinion/search/fullsearch.htm.

New FAQs issued for federal contractors. The DOL's Office of Federal Contract Compliance Programs (OFCCP) in July released FAQs on three topics: (1) validation of tests used by contractors when selecting workers, (2) the OFCCP's use of "practical significance" during compliance evaluations, and (3) how contractors can determine whether to include project-based or freelance workers in their affirmative action programs and employment activity data submitted to the agency. The FAQs on employment testing remind contractors to validate procedures used in the selection process if they find a disparate impact. The FAQs on "practical significance" address how the OFCCP determines where to apply investigative resources. The FAQs on project-based workers address how to determine those workers' status.

OSHA promotes its resources aimed at workplace hazards. The Occupational Safety and Health Administration (OSHA) reminds employers it has developed compliance assistance resources to help find and fix workplace hazards before they cause injury or illness. The Safe + Sound campaign webpage (www.osha.gov/safeandsound/) has resources and activities for finding and fixing hazards. The Recommended Practices for Safety and Health Programs (www.osha.gov/shpguidelines/) identifies actions for hazard identification and assessment and hazard prevention and control. A fact sheet (www.osha.gov/safeandsound/docs/SHP_That-Was-No-Accident.pdf) guides employers through the process of using an OSHA 300 log to identify workplace hazards. Guides for managers (www.osha.gov/safeandsound/docs/SHP_Safety-Walk-Arounds-for-Managers.pdf) and safety officers (www.osha.gov/safeandsound/docs/SHP_Safety-Walk-Arounds-for-Safety-Officers.pdf) are also available. ✤

Puff up your policy to avoid penalties

In addition, the law requires the proprietor or person in charge of an enclosed indoor workplace to develop and implement a policy addressing its prohibitions on smoking and vaping. The policy may include procedures that will be taken when the proprietor witnesses or is made aware of smoking or vaping in the enclosed indoor workplace. The person in charge of an enclosed indoor workplace may, at his discretion, post signs to indicate that smoking or vaping, or both, is prohibited.

Any person who violates the FCIAA's prohibition on smoking and vaping in an enclosed indoor workplace commits a noncriminal violation punishable by a maximum fine of $100 for the first violation and $500 for each subsequent violation.

Bottom line

E-cigarettes are a $4 billion industry in the United States. Their popularity means you will likely see increased use by employees who might not think they need to go outside to vape because they aren't using a tobacco product. As a result, you should educate your employees on the new indoor vaping prohibitions. In addition, to comply with the new law, you should update your smoke-free workplace policies (if you haven't already) to ban vaping as well as smoking in the workplace. Otherwise, you might get burned.

You may contact Lisa Berg at lberg@stearnsweaver.com. ✤

EMPLOYER LIABILITY

Florida appellate court says noneconomic compensatory damages are available in FPWA cases

by Michael P. Spellman and Jeffrey D. Slanker
Sniffen & Spellman, P.A.

Florida's 3rd District Court of Appeal (DCA) recently issued a decision that will have a major impact for the state's public-sector employers and the companies that contract with them. The court found that employees who file claims under the Florida Public Whistleblower's Act (FPWA) are entitled to compensatory noneconomic damages for violations of the law. The expansion of damages is significant for any entity subject to litigation under the FPWA, which may even include nongovernmental entities.

Facts of the case

Juan Iglesias worked for the Hialeah Police Department. On October 21, 2015, after receiving a disciplinary notice for not meeting traffic enforcement standards, he sent a letter to the chief of police, Sergio Velazquez, and the mayor, Carlos Hernandez, in which he alleged that the police department had continued enforcing ticket quotas even though they had been banned by the Florida Legislature.

On January 7, 2016, Iglesias sent another letter reiterating his allegations about the ticket quotas after he received additional disciplinary notices. The mayor approved the recommended disciplinary actions against him, however. The Personnel Board of Hialeah upheld the disciplinary actions but reduced his punishment to a 10-hour suspension.

Iglesias sued the city under the FPWA, alleging it had retaliated against him for sending the complaint letters. He appealed a decision by the trial judge that he wasn't entitled to recover noneconomic damages under the statute. The 3rd DCA decided that, in spite of the FPWA's failure to mention the recovery of noneconomic compensatory damages, such damages are available under the statute.

Appellate court's opinion

Many categories of damages are involved in civil litigation. Compensatory damages can be economic or noneconomic. Economic damages, which include wages, the value of benefits, and other tangible amounts, are fairly easy to compute. Noneconomic damages, which compensate the wronged party for things such as humiliation, mental anguish, and mental or physical pain and suffering, are imprecise.

In the subsection titled "Relief," the FPWA states that relief "must" include the employee's reinstatement to the same position or an equivalent one, reinstatement of benefits, "compensation, if appropriate, for lost wages, benefits, or other lost remuneration caused by the adverse action," injunctive relief, and attorneys' fees and costs for the prevailing party. Nowhere does the Act mention noneconomic damages.

By contrast, Florida's Private Sector Whistleblower Act (FWA) provides for the same relief as the FPWA (compensation, reinstatement, and injunctive relief) but also includes a provision for "any other compensatory damages allowable at law." Presumably, the legislature omitted that provision from the public-sector law for a reason. As a matter of statutory construction, it's generally accepted that if lawmakers use one term in one part of a statute but not in another, the omission evinces their intent to impart a different meaning.

Before the 3rd DCA issued its decision in this case, public-sector employers had succeeded in excluding noneconomic compensatory damages under the FPWA at the trial court level. The two DCAs that reviewed cases involving the statute, however, reached contrary decisions. In the 2002 case *Amador v. Florida Board of Regents,* the 3rd DCA implicitly held that noneconomic compensatory damages weren't available under the FPWA when it reinforced an interpretation that the Act's remedies are equitable in nature. In 2008, the 1st DCA stated in *O'Neal v. Florida A&M University* that damages for pain and suffering or other noneconomic damages might be available under the FPWA.

The 3rd DCA's decision in *Iglesias* squarely addresses the noneconomic damages issue to the detriment of public-sector employers and other entities subject to the FPWA by virtue of a contractual relationship with a public-sector employer. A unanimous panel of three judges concluded the damages listed in the Act are "a floor, rather than a ceiling, on the types of relief that a party can seek." Citing the 1st DCA's decision in *O'Neal,* Judge Ivan Fernandez wrote that the FPWA "mandates that an award include the remedies explicitly identified within the statute, but does not expressly [address] other recoverable damages, therefore allowing other forms of relief as may be appropriate under applicable law."

The end result of this decision is that employees and job applicants suing under the FPWA may now recover noneconomic damages for humiliation, embarrassment, and mental pain and suffering. Employers should also be aware courts have ruled in the past that claims under the FPWA are not subject to the statutory cap on damages public entities enjoy in tort (personal injury) cases or to any other cap on damages. As we mentioned, the Act also allows for prevailing parties to be awarded their attorneys' fees.

At this point, it isn't clear whether the city of Hialeah will ask the Florida Supreme Court to review the 3rd DCA's decision or if it will even have an opportunity to pursue an appeal. In addition, there doesn't appear to be any movement in the Florida Legislature to amend the FPWA at this time. *Iglesias v. City of Hialeah,* Case No. 3D18-639.

Significance of the decision

Employers must understand that the FPWA reaches beyond state and local governmental employers to embrace companies that contract with public entities, which may include small employers with government contracts that aren't covered by the FWA. This case significantly

alters the landscape for employers that find themselves facing FPWA claims. As a result, you must be vigilant in ensuring your policies and practices minimize your exposure.

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DISABILITY DISCRIMINATION

Don't get caught in the ADA web: Make sure your website is accessible

By now, most of you know your workplaces must be compliant with the Americans with Disabilities Act (ADA). Potential accommodations can include installing a wheelchair ramp or providing assistive technology to employees with visual or hearing impairments. You also probably know you have a duty to maintain ADA compliance for potential customers if your business is a "place of public accommodation," which includes virtually any business that engages in commerce with the public. But what you may not realize is that the ADA can even require you to make your commercial website accessible to people with disabilities, particularly consumers with visual impairments.

In the past two years, we have reported on website accessibility lawsuits against Winn Dixie and Hooters. Several associations representing disabled people have crisscrossed Florida, bringing accessibility lawsuits against businesses that are open to the public. If your company's website is not ADA-compliant, you may be vulnerable to the next wave of lawsuits..

Lawsuit over website access

The 4th Circuit recently addressed the extent of the potential ADA liability for having an inaccessible website in a case filed by Clarence Griffin, a blind man who attempted to access the Department of Labor Federal Credit Union's (DOLFCU) website. Because of his visual impairment, he accesses content on the Internet with a screen reader, which reads aloud the text that appears on a website. The text on the DOLFCU's website, however, was incompatible with his screen reader.

In an attempt to rectify the problem, Griffin filed a lawsuit under the ADA in federal district court challenging the "Credit Union's failure to make reasonable modifications to its policies and practices that would make its [web]site accessible to the disabled." The district court in Alexandria dismissed the case. It found he couldn't pursue his case for one big reason: He was precluded from being a member of the DOLFCU, so he hadn't suffered the requisite concrete and particularized harm necessary to file a lawsuit.

4th Circuit's decision

Griffin appealed to the U.S. 4th Circuit Court of Appeals, but he also failed to convince the appeals court that his lawsuit should go forward. While expressing sympathy for individuals with visual impairments, the court pointed out that the benefits of the DOLFCU are limited to current and former employees of the U.S. Department of Labor (DOL) and their immediate families and households, and Griffin didn't fit into any of those categories. Accordingly, the court reasoned he hadn't been denied any services or benefits he otherwise could obtain but for his inability to access the DOLFCU's website.

The 4th Circuit also rejected Griffin's argument that he could pursue his lawsuit as an ADA "tester"—someone who tests a business for ADA compliance and files a lawsuit to correct any perceived shortcomings. Although it found he couldn't claim tester status, the appeals court was careful to limit its holding to the facts of the case. The court made clear its decision doesn't preclude all ADA testers from filing suit, provided they can plausibly argue they can use the product the business offers.

For example, while a disabled individual living hundreds of miles away from a supermarket likely couldn't file suit if the supermarket wasn't ADA-compliant, he could sue if he lived 20 miles away and it was at least plausible that he might go grocery shopping there. But in Griffin's case, the 4th Circuit explained, there was an impenetrable legal barrier to his joining the DOLFCU or enjoying its benefits unrelated to his disability. Thus, the 4th Circuit affirmed the district court's dismissal of the case. *Griffin v. Department of Labor Federal Credit Union*, 912 F.3d 649 (4th Cir., 2019).

Rise in ADA lawsuits

The DOLFCU got lucky in this case because it appears from the allegations in Griffin's complaint that its website isn't ADA-compliant. If a visually impaired person who is eligible to join the DOLFCU had filed the lawsuit, that person likely would have been able to proceed with an ADA claim and require the credit union to change its website to make it accessible to people with visual impairments.

Indeed, the odds of being the subject of an ADA lawsuit alleging your business website is inaccessible to someone with impaired vision are becoming much higher. The last few years have seen a dramatic rise in ADA Web accessibility claims. A recent report from UseableNet found that such lawsuits increased 31 percent in the first quarter of 2019 compared to the same quarter last year.

Florida and New York have been the site for most of the Web accessibility lawsuits that are being filed. But as Griffin's lawsuit confirms, businesses elsewhere are not immune from legal actions, and the number of Web accessibility lawsuits is expected to increase as such claims continue to trend throughout the country.

Bottom line

Best practices in this area dictate that you take a proactive approach and ensure all aspects of your business operations are ADA-compliant. That's especially true for areas of your business that can be easily accessed from anywhere in the world and turned into places of public accommodation for purposes of the ADA, such as your company's website.

You can learn more about the ADA's requirements for Web accessibility and how to make your website accessible by viewing the webinar "Website Accessibility: Meet Required Digital Accessibility Standards Amid Increased Legal Scrutiny." For more information, visit https://store.blr.com/website-accessibility-021919-on-demand. ✤

HEALTH INSURANCE

IRS authorizes more preventive services to be paid by HSA-eligible health plans

The IRS recently issued guidance expanding the definition of "preventive care" that may be covered—possibly free of charge—by a high-deductible health plan (HDHP) that's paired with a health savings account (HSA). While the changes made by the guidance are relatively simple, they have the potential to make HSAs substantially more attractive, particularly to employees who have a chronic condition that is controlled by medication or therapy. Before diving too far into the details, however, it's important to have a solid understanding of HSAs and how they work.

Some background

HSAs are a type of tax-favored account employees put money into on a tax-free basis and later use to pay their medical expenses. For an individual to contribute to an HSA, he must be covered by an HDHP that covers only "preventive care" until after the deductible is met. In other words, other than the types of preventive services all health plans are required to cover at no cost to employees (such as immunizations and mammograms), employees who are covered by an HSA-eligible HDHP have been required to pay 100 percent of their health expenses up to the amount of the (very high) deductible. While that can be off-putting to many, some of the tradeoffs include substantial tax benefits, lower premiums, a low out-of-pocket max (often the same as the deductible), and for some, sizeable employer contributions to their HSAs.

The rationale behind the HSA/HDHP approach is that when employees are required to pay their own health expenses up front, they will be more motivated to shop around for cost-effective health care and/or avoid unnecessary treatments. One of the biggest objections to HSAs, however, has been that they can discourage participants from getting the health care they need and cause worsening health conditions in the long run. The new IRS guidance is intended to reduce that concern to some extent.

WORKPLACE TRENDS

Texting gaining popularity in hiring process. More employers and job candidates are using texting as a communication method, according to research from Robert Half Technology. More than two-thirds (67%) of IT decision makers surveyed said their organization uses texting as one way of coordinating interviews with job candidates. Nearly half (48%) of U.S. workers polled in a similar survey said they've received a text message from a potential employer. When asked about the greatest advantage of texting during the hiring process, quick communication was the top response among IT managers and workers. They also acknowledged the greatest drawback was the possibility of miscommunication.

Inclusion survey finds persistent bias. Despite organizations' efforts to advance inclusion in the workplace, many professionals are experiencing and witnessing bias on a regular basis, and it affects their performance, according to the 2019 State of Inclusion Survey from Deloitte. One finding from the survey is that professionals mostly experience or witness bias that is subtle and indirect, making it hard to address in the moment. The survey also found that people believe they are allies and say they feel comfortable talking to others about bias, but they don't always act when they see it in the workplace. Among professionals who had recently felt they experienced workplace bias, 61% said it had occurred at least once a month and as often as several times per week.

Job or career? Survey shows 50-50 split. Employees are split on how they feel about their current job, with 50% feeling like they have a career and the other 50% feeling like they have just a job, according to a survey from CareerBuilder. Representative samples of 1,021 hiring managers and HR managers and 1,010 full-time U.S. workers across industries and company sizes in the private sector were surveyed. One key finding is that many employees want to get ahead in their career but aren't offered educational opportunities to learn the skills needed to do so. Another finding highlights the importance of the jobseeker's experience, with 42% of employees saying that an application that is difficult or confusing to complete would cause them to give up before submitting.

Survey finds employers boosting benefits to win and keep talent. Employers are boosting benefits to recruit and retain highly qualified and high-potential employees in a competitive labor market, according to data from the Society for Human Resource Management's 2019 employee benefits survey. Eighty-six percent of employers responding to the survey believe health-related benefits are very important or extremely important to their workforce. ✤

UNION ACTIVITY

Miners' union invites presidential candidates to go underground. The international president of the United Mine Workers of America in July sent letters to all the candidates for the Democratic nomination for president inviting them to go to a union coal mine and go underground. Cecil E. Roberts said coal miners want to know that those running for president "have some understanding of what they do and why they do it." Roberts sent the letter at a time when the sector of the coal industry that produces steam coal, used as fuel for electricity generation, is under stress. Coal-fired power plants are disappearing, with 289 closings since 2010 and 50 since January 2017. A statement from the union said most Democratic presidential candidates have endorsed the Green New Deal or offered similar plans that would hasten the closure of coal-fired power plants and the mines that feed them. Roberts said the candidates "owe it to these workers to meet them face to face, tell them their plans, and then just listen."

New measure targets workplace violence, harassment. The United Auto Workers (UAW) has spoken out in favor of action taken by the International Labour Organization (ILO), an arm of the United Nations that sets internationally recognized labor standards. In June, the ILO adopted Convention 190, which extends protections to workers facing violence and harassment. It will be binding for governments that ratify it. "The UAW has been, and always will be, a tireless defender of workers' rights," UAW President Gary Jones said. The right to a safe and harassment-free work environment is doubtlessly a human right as well. Therefore, the UAW wholeheartedly stands with the ILO in supporting the new standards and protections of Convention 190. We urge the timely ratification of this measure."

Teachers unions condemn Trump attack on congresswomen. Education International (EI), a global body representing the world's teachers, voted in July to condemn President Donald Trump's attack on four U.S. congresswomen and pledged to support American unions in their fight to defeat him in 2020. The resolution was brought to the floor of EI's world congress by the American Federation of Teachers (AFT) and the National Education Association (NEA). The resolution took aim at Trump's rhetoric toward four freshman female, nonwhite members of Congress: Alexandria Ocasio-Cortez of New York, Ilhan Omar of Minnesota, Ayanna Pressley of Massachusetts, and Rashida Tlaib of Michigan. A statement released by the NEA said that by telling the representatives to "go back to where you came from," the president "once again employed racist, xenophobic and sexist tropes to try to disparage and divide American citizen from American citizen." ✤

What has changed?

In short, the new guidance allows HSA-eligible HDHPs to cover more preventive drugs and therapies at no cost to employees (or possibly with some form of coinsurance or copay) by expanding the definition of "preventive care" the plan can cover before the deductible is met. Previously, the definition of preventive care was narrowly restricted to such things as immunizations, annual exams, and standard screenings such as colonoscopies or mammograms.

The types of preventive care that now may be covered by an HSA-eligible HDHP include a number of medications, tests, therapies, and devices that can help employees manage or minimize such conditions as:

- Diabetes;
- High blood pressure;
- Various heart conditions;
- Osteoporosis and osteopenia;
- Asthma;
- Liver disease and bleeding disorders; and
- Depression.

Some specific examples of items that can be covered as preventive medicine include blood pressure monitors for hypertension, a glucometer and A1C testing for diabetes, and SSRIs, which are a category of anti-depressants. The complete list can be found in the guidance at https://www.irs.gov/pub/irs-drop/n-19-45.pdf.

Some final thoughts

When it comes to HSAs, it's important to distinguish between:

(1) The types of preventive care that are required to be covered by a group health plan at no cost to employees;

(2) The types of preventive care an HDHP can cover before an employee has met his deductible;

(3) The types of medical expenses an employee can use an HSA to pay for.

The only effect of the guidance is that it expands the definition of preventive care with regard to #2. It doesn't require plans to cover those services for free (but we would expect many HDHPs to be designed that way). Nor does it have anything to do with the types of medical expenses that can be reimbursed out of an employee's HSA.

While the effective date of the notice was July 17, 2019, employers that offer a fully insured health plan likely will have to wait until their next renewal (or possibly even longer) while their insurance carrier works through implementing the changes and getting them approved by the necessary state departments of insurance. If you're self-insured, you should be able to take advantage of the new rules sooner than that, either by modifying an existing HDHP or offering one for the first time.

Finally, HSAs are very popular among Republicans and many Democrats, and how many things can you say that about? As their popularity has increased, there have been increasing calls from legislators and healthcare/insurance professionals to make them more "user-friendly," so to speak. The guidance from the IRS may be the first of many attempts to do just that, so keep an eye out for future developments. ✤

REGULATIONS

Association retirement plans may not be ready for prime time

The U.S. Department of Labor (DOL) recently finalized regulations allowing multiple employers to offer a retirement plan to their employees through a combined association retirement plan (ARP). In what is becoming a common theme for the agency under President Donald Trump, the new rules are intended to make it easier for small to mid-sized employers to offer such plans to their employees. While they are similar to rules finalized last year that established a new type of association health plan, they go even further by establishing guidelines for professional employer organizations (PEOs) to sponsor retirement plans for their members' employees. Unfortunately, they also may face some of the same problems as those rules, but we're getting ahead of ourselves.

Let's take a quick look at the issues the new ARPs are intended to address, how they are designed to work, and some of the potential problems.

Need for the plans

Citing various studies, the DOL notes that while 85 percent of private-sector establishments with 100 or more employees offer a retirement plan, only 53 percent of smaller organizations offer one. That's a total of 38 million private-sector employees whose employers don't offer a retirement savings plan. Many small employers cite cost, administrative responsibilities, and potential exposure to fiduciary liability as major impediments to sponsoring a retirement plan for their employees. ARPs are intended to help with those concerns.

ARPs are considered a type of multiple employer plan (MEP). Although many MEPs already exist and are authorized by the IRS, past guidance issued by the DOL hasn't clearly allowed them to be sponsored by associations and PEOs in the capacity of an "employer." By making that change, the rules enable associations and PEOs to act as the plan administrator and named fiduciary and remove most of those responsibilities from the shoulders of the small employers that participate in the plan. It's also anticipated ARPs will allow smaller employers to offer retirement plans at a lower cost than they could under previously available options such as simplified employee pensions (SEPs) and a savings incentive match plan for employees (SIMPLE plan).

Who can participate?

The final rule makes clear an ARP now can cover employers not just in the same industry but in the same geographic area, such as a common state, city, county, or metropolitan area (even if it crosses state lines). While the rule is applicable to "firms of all sizes," the DOL anticipates participation primarily by employers with under 100 employees.

The final rule includes a regulatory safe harbor for PEOs that want to offer a retirement plan to their client employers. While some PEOs already offer such plans, the safe harbor creates clear standards that haven't previously existed.

To meet the safe harbor, a PEO must:

- Play a definite and contractually specified role in recruiting, hiring, and firing workers of its client employers that adopt the MEP; and
- Assume the following responsibilities without regard to the receipt or adequacy of payment from client employers:
  - Payment of wages to their employees;
  - Payment and performance of reporting and withholding for all applicable federal employment taxes; and
  - Assumption of responsibility for and substantial control over the functions and activities of any employee benefits the contract with a client employer may require the PEO to provide.

Working owners without employees, including sole proprietors, also are eligible to participate in an ARP and may elect to act as the employer (for the purpose of participating in a bona fide employer group or association) and be treated as an employee of their business (for the purpose of participating in the ARP).

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10-21 Leading Safety Indicators: New Strategies for Tracking and Improving Safety Performance

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10-23 1094-C and 1095-C and Employer Shared Responsibility Requirements: How to Get a Jump on Upcoming ACA Compliance Deadlines

10-24 Workplace Violence Could Happen at Your Facility: Assessing Your Risks and Identifying Safeguards to Protect Employees

10-25 FMLA Certifications: How to Get the Medical Information You Need to Properly Designate Leave and Decrease Abuse

10-28 OFCCP Scheduling Letters, Anticipated Changes and More: The Latest Outlook under New Acting DOL Secretary Pizzella—and the Practical Impact on Federal Contractors

10-29 Holiday Headaches: How to Avoid Pay, Discrimination, Harassment, and Other

To qualify as a working owner, a person would be required to work at least 20 hours per week or 80 hours per month, on average, or have wages or self-employment income above a certain level. Interestingly, working owners can't participate in a plan offered by a PEO unless they have at least one employee.

What are some concerns?

While the new rules are effective September 30, 2019, it will likely take a while for them to ramp up—if they do at all. While few would argue with their stated purpose, there may be concern about the execution. The similar AHP rules issued last year were slow to take off for a number of reasons, not the least of which was that they appeared to exceed the Employee Retirement Income Security Act's (ERISA) authority to define who could be considered an "employer" for the purpose of establishing an employee benefit plan. A number of states sued to challenge the rules, and they have been put on hold by a court, which referred to them as "absurd" and an unlawful expansion of ERISA.

The ARP rule presents some of the same concerns and may face similar legal challenges. Early adopters of the AHP rules are now facing uncertainty as a result of legal challenges. You are advised to perform due diligence on the potential risks that may exist before moving forward with developing or participating in an ARP. ✤

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